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SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

No. 75-197

October Term, 1975

In the Matter of the Arbitration
between INTSEL CORPORATION,
Petitioner-Respondent,

-against-

M.W. ZACK METAL COMPANY,
Respondent-Petitioner.

REPLY TO OPPOSITION TO WRIT OF CERTIORARI OR SUMMARY REVERSAL

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Restatement of the Law, 2nd Edition, Conflict of Laws, Section 25.

§ 25. Notice and Opportunity to be Heard

A state may not exercise judicial jurisdiction over a person, although he is subject to its judicial jurisdiction, unless a reasonable method is employed to give him notice of the action and unless he is afforded a reasonable opportunity to be heard.

Comment:

a. Rationale. It is unjust for a state to seek to affect through its courts a person's interests without giving him a chance to protect those interests. For this reason, a state may not exercise such judicial jurisdiction as it may possess unless a reasonable method is employed to give the defendant notice of the proceeding and unless he is afforded a reasonable opportunity to be heard.

b. Judicial action without notice or opportunity to be heard. In the United States, the due process clause of the Fourteenth Amendment to the Constitution prohibits the States from taking action through their courts without having employed a reasonable method to inform the defendant of the proceeding or without having afforded him a reasonable opportunity to be heard. The due process clause of the Fifth Amendment prohibits the United States from taking similar action. A judgment rendered in this country without these requirements having been met is void, even in the State where rendered, and is not entitled to full faith and credit in sister States. To the extent that notice and opportunity to be heard are constitutional requirements, the decisions of the Supreme Court of the United States are controlling.

A judgment may be invalid either because a reasonable method of notification is not provided by the local law of the state in which the action is brought or because the method provided is not followed.

In a state in which the power of the legislature is not restrained by constitutional provisions, the legislature may authorize or direct its courts to render judgment without having given the defendant reasonable notice of the proceeding and a reasonable opportunity to be heard. Such judgments will be valid in the state where rendered but will neither be recognized nor enforced in other states.

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h. Opportunity to be heard. If the defendant was denied a reasonable opportunity to be heard, a judgment rendered against him will be void in the state of rendition itself, if this state is a State of the United States, and in any event will not be recognized or enforced in other states. This will be true even though the state had judicial jurisdiction over the defendant and even though he was given proper notice of the action. Notice to a defendant of the claim which is being made against him is of no value to him if he is denied the opportunity to defend against the claim. This may happen when in the particular action the conduct of the court is so flagrant as to deny the defendant the opportunity to be heard, such as when the court arbitrarily strikes out an answer which the defendant makes to the claim and renders judgment against him. The same is true when, although the defendant is given notice of the action, a judgment is rendered against him so shortly thereafter that he has no adequate opportunity to interpose a defense.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1975

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QUESTION

Has Intsel proven that an arbitrable dispute was placed before the arbitrator and that the award was within the scope of the agreement or of a modification thereof to support its entitlement to the award.

ARGUMENT

The answer to the question in the caption is, no. As the basic ground of this application is that no arbitrable issue was placed before the arbitrator because the agreements to arbitrate had been terminated:

(a) by a subsequently executed oral agreement and

(b) by application of New York law to the facts placed before the arbitrator,

Intsel should have met Zack's claims to the facts proving the foregoing. It does not. It does not deny that Zack made an oral agreement of novation with Besso, executive vice-president of Intsel, late in November to take in the late delivery of the goods for the purpose of minimizing Intsel's loss by selling them for Intsel's account and that Zack stored the goods and tried to sell them. Nor does it deny that the arbitrator should have applied New York law to those facts or that under New York law, this oral agreement effectively terminated the prior written agreements of purchase and sale without obligation on the part of Zack to pay the contract price for the goods delivered under the oral stipulation. In its opposition, Intsel does not deny that Zack talked with Besso to the effect mentioned and that the delivery of the goods was made under the oral agreement and not under the prior written contracts, or that Besso never testi-

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fied to contradict Zack's claims. Nor does Intsel deny that Krasnov had talked with Intsel all during September, the month of the agreed upon delivery at Detroit, and that Krasnov had cancelled the agreements late in September because he could not get a shipping date, let alone a delivery date out of Intsel for September.

The limits of the arbitration established by the contracts terminated were "Any controversy arising under or in relation to this contract or any modification thereof * * *". The arbitrator was not thus empowered to decide the question of termination of the contract and the evidence on that issue was submitted to him for the purpose of showing that his powers under the writings had ended. Despite Zack's clear entitlement under New York law to a dismissal of the arbitration, the arbitrator awarded under two documents, one of which is dated January 13, 1969, which is not at all a contract of parties, the contract price stipulated in the writings of June and August and September.

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The award simply disregarded the uncontroverted evidence of cancellation and of a later novation and the fact that Zack acted upon the novation agreement, and had no obligation to pay the contract price. Surely, this is evidence of an excess of power despite the boot-strap arguments of Intsel concluding that there was no proof of the arbitrator exceeding his powers. Modification is, and can never be a termination and an oral novation terminating prior written contracts can never be the contract which is to be arbitrated. It confuses the grant of power to arbitrate "any controversy arising under or in relation to this contract or any modification thereof", with the failure to grant power to arbitrate. The oral novation is neither the contract nor a modification of the superseded written contracts. Therein lies the error of Intsel.

A New York Court of Appeals case that discusses an award within and without the scope of the agreement granting arbitration is Mtr of Granite Worsted Mills (Cowen), 25 N.Y. (2) 451. The facts of the matter are the guides for the courts in determining

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that issue, just as this court has done in the Atkinson, Howard Johnson Co., and the Burnes cases cited at p. 37 of the petition.

Obviously, proceedings under the Arbitration Act in the Federal Courts are separate and differ from the proceedings at the arbitration hearing. Proceedings under the Arbitration Act are subject to the Federal Rules of Civil Procedure. Under these Rules, an issue of fact must be put to the test of a trial. A right granted by Congress under the Arbitration Act, is the right of the loser in an arbitration proceeding to claim that the arbitrator has exceeded his powers. How does the loser go about asserting such right; but by moving to vacate the award and assert the factual proof of the excess of power. Would the loser be foreclosed by the rule of case law that arbitrators' awards are not subject to supervision of the courts or that their findings of fact or conclusions of law are not subject to review by the courts? To apply these principles would be to defeat the clear man-

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date of Congress that a loser has the right to claim that the award is in excess of power. There must be a clear division then between when an award may not be reviewed and when it may be reviewed. It will not do, to do, as Intsel says, apply the law foreclosing review to every award of an arbitrator. This is patently erroneous. Nor may Intsel claim before the Federal Court in opposition to a motion to vacate the award that there was an acceptance of the goods by Zack under the writings when there was no proof of that fact before the arbitrator. Indeed, such a claim by Intsel would disregard its clear failure to deny that both cancellation and termination were effectuated by uncontroverted evidence. And, of course, in this case, there was no stenographic record of what evidence was placed before the arbitrator, so that, Zack was forced to rely upon the written documents offered or conceded before the arbitrator, and by affidavits stating what the parties claimed was orally testified to in the arbitration.

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The question then arises if opposing claims to the nature of the oral proof before the arbitrator arises in the District Court does that court have the power to acccpt one contention and reject the other without a trial where the power of the arbitrator is at issue. If an issue of fact is raised as to the nature of the evidence before the arbitrator, may a District Court decide that issue without a trial? Not anymore than any other issue of fact presented to it for resolution.

Intsel, on its part claims that the court may accept its statements of the evidence before the arbitrator without holding a trial. But it offers no cases to support that stand. Zack offers the act itself and the Potterberg and Campbell cases to support its claims.

Besides, Intsel's claims are not of facts but are of conclusions which are ambiguous, and do not contradict the fact statements of Zack. Intsel's claims are contained in the affidavit of Schwartz opposing the motion to vacate which is found at

pp. 55-69 of the appendix. In its opposition to this application it alludes to p. 68 of that affidavit as the source of its claims to facts allegedly contradictory of Zack's claims to a novation and cancellation. That page is attached hereto for this court's convenience. Nowhere in that page, nor in any other part of that affidavit is there a statement by Intsel that the cancellation and novation was not testified to before the arbitrator by Zack as is claimed in Zack's affidavit before the District Court. There is a statement on p. 68 that the award was for the quantities "delivered against the orders and accepted and retained by Zack. At the hearing, evidence was presented to indicate that immediately before delivery Intsel asked Zack if pursuant to common practice in the industry it could accept slight overages on the orders and that Zack indicated its approval".

Yet no claim is made as to who acted for Zack or for Intsel or when such acceptance was made. When it is recalled that only Mr. Fifield testified for Intsel before the arbitrator and by his own admission, Mr. Fifield testified that he had no

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personal knowledge of the matter, he could not, at the hearing, claim an acceptance of delivery in any quantity for Zack's own account. Zack's own affidavits before the District Court stated that Intsel's sole witness was Mr. Fifield who having said that he had no personal knowledge of the facts, before 1971, he did not utter a word in denial of Zack's claim to the uncontroverted evidence of cancellation and a novation before the arbitrator. The foregoing statement at page 68 could not therefore be competent to raise an issue respecting the factual claims of Zack to a proper cancellation or a novation agreement in accordance with New York law. Assuming it raises some doubt as to the truth of Zack's claim, a trial of the issue would have arisen. Schwartz had the opportunity to supply proof of the facts of his claim, but he did not take that opportunity. If a valid issue of fact appeared respecting the making and carrying out of the novation agreement, a trial of that issue should have been ordered by the

District Court. Zack's conclusion is that because no one testified for Intsel at the hearing denying the novation or the cancellation, those facts were uncontroverted and were binding upon the arbitrator and upon the District on the motion to vacate the award. The District Court should have dismissed the arbitration as a matter of law.

As it is the disregard of the proof by the arbitrator and by the District Court and later by the affirmance by the Court of Appeals, only resulted in the disregard of the plain sense of the facts and of the law applicable thereto. Such action is in plain derogation of Zack's rights. Where tribunals fail to follow their own Rules in deciding a matter, a fair hearing, as guaranteed by our constitution, is not had. See Restatement of the Law, Conflict of Laws, 2nd Edition; Section 25. The decision is void and may be attacked collaterally

Intsel overlooks this aspect of the case. Its reliance upon case law which denies the right of a review of the award, in this case, misconstrues

the point of the cases. Plainly, those principles apply where it can be said that the arbitrator acted within the scope of his authority. When he acts outside the scope of his authority, and, a question of fact is raised respecting whether the award is outside the scope of that authority, a court cannot refuse to examine the facts and pursuant to the rules of procedure, a trial must be had. The Potterberg and Campbell case applied that principle in divergent fact cases. Congress has not limited the right of the loser to claim and to prove entitlement to a vacature on the ground of excess of power. Intsel must be wrong in insisting that there is no review, and that Potterberg and Campbell are aberrations of the rule.

The rule that issues of fact must be subjected to the test of a trial is a constitutionally granted right and in this case, that right was taken from Zack by misapplied reasoning in favor of inapplicable law.

WHEREFORE this court is respectfully requested

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to reverse the Court of Appeal's judgment, summarily, with appropriate directions or to grant a writ of certiorari.

Respectfully submitted,

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APPENDIX TO REPLY

REPLY AFFIDAVIT OF JOHN M. SCHWARTZ
IN SUPPORT OF MOTION TO CONFIRM

Zack's various allegations that these contracts were orally "cancelled" before delivery or that there was an oral agreement at the time of delivery that Zack was accepting the goods conditionally. These allegations were made during the hearing and were vigorously opposed by Intsel. In fact, the documentary evidence submitted by both sides tended to indicate that the contracts had never been cancelled and that Zack had accepted delivery and retained the goods. The repeated assertions by Zack and its attorney that their allegations on these matters were "conceded" by Intsel is absolutely false and an unconscionable distortion of what occurred at the hearing.

THE COMPUTATION OF DAMAGES

20. Zack argues that the damages of $35,253.60 awarded by the arbitrator were excessive. On the contrary, the damages, as claimed by Intsel in its Demand for Arbitration and awarded by the arbitrator, were based precisely on the quantity of goods delivered against the orders and accepted and retained by Zack. At the hearing, evidence was presented to indicate that immediately before delivery Intsel asked Zack if pursuant to common practice in the industry it would accept slight overages on the orders and that Zack indicated its approval. The invoice prices were

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